2006

Steven Crawley : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

In the Matter of the Discipline of:	)	**BRIEF OF THE PETITIONER/ APPELLANT**
Steven Crawley, #0750,	)	
Respondent.	)	**Supreme Court No. 20060451**

Appeal from the Third District Court, Salt Lake County

Judge Denise P. Lindberg

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Statement Showing the Jurisdiction of the Utah Supreme Court:

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Constitution article VIII, section 4, which provides that "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."

Statement of the Issues Presented for Review:

Issue One: Whether the district court erred in staying an attorney's suspension for intentionally engaging in professional misconduct involving dishonesty, and instead imposing a period of probation. The standard of review for sanctions imposed for professional misconduct in attorney discipline actions is a correctness standard, but the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. *See In re Babilis*, 951 P.2d 207 (Utah 1997). This issue was preserved through oral argument during the sanctions hearing. (R.189 at 90-91; 100-101)

Issue Two: Whether the district court erred in giving undue weight to mitigating factors such as restitution, remorse, and candor to the court. The standard of review for sanctions imposed for professional misconduct in attorney discipline actions is a correctness standard, but the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. *See In re Babilis*, 951 P.2d 207 (Utah 1997). The issue was preserved through oral argument during the sanctions hearing. (R. 189 at 92-101)

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STATEMENT OF THE CASE

Nature of the Case: This is an attorney discipline case.

The Course of Proceedings: The case originated in a disciplinary action against Steven Crawley. (R. 1-14) The matter came before the trial court in a combined adjudication and sanctions hearing on November 7, 2005. (R. 154). The case was transferred to Judge Lindberg. Pursuant to a motion from the Office of Professional Conduct ("OPC"), the trial court entered Amended Findings of Fact, Conclusions of Law, and Order of Discipline. (R. 154-165) This appeal ensued. (R. 179-180) By Order of this Court on July 13, 2006, this appeal was consolidated with *In re Henderson*.

Disposition in the Trial Court: Crawley was suspended for a period of one year, but the suspension was stayed and Crawley was placed on probation for a period of eighteen months subject to certain conditions. (R. 162-164).

STATEMENT OF THE RELEVANT FACTS

Crawley was a shareholder of the law firm Babcock, Bostwick, Scott, Crawley and Price ("the firm"). (R. 155) One of the firm's clients was Interwest Construction.

(R. 155)

Crawley represented Interwest Construction in two matters relevant to this case–Case One, denominated *Pettit Distribution Centers v. Interwest Construction* ("the Pettit Distribution matter"), and Case Two, denominated *Toothman-Orton Engineering v. Interwest Construction* ("the Toothman-Orton matter"). (R. 155)

The Pettit Distribution matter involved a primary claim against Interwest Construction, and Interwest Construction's three third-party claims against other entities. (R. 156) Each of these matters would have been enhanced by obtaining an expert report or affidavit, but Crawley failed to obtain either one. (R. 156)

In the Fall of 2001 in the Pettit Distribution matter, Interwest Construction lost some of its third-party claims for lack of any supporting evidence, including an expert report, and the court assessed attorneys' fees against Interwest Construction in two of the third-party claims. (R. 156) Crawley failed to inform Interwest Construction that its third-party claims were dismissed, and that attorneys' fees had been assessed against it. (R. 156) Also in the Pettit Distribution matter, the court granted partial summary judgment against Interwest Construction in March 2002, and the lack of an expert report was part of the reason. (R. 156)

Crawley misrepresented the status of the Pettit Distribution matter to Interwest Construction. (R. 156) Crawley also misrepresented the status of the Pettit Distribution matter to the firm. (R. 156)

The Toothman-Orton matter involved an action against Interwest Construction for breach of contract. (R. 156) Interwest Construction counterclaimed against Toothman-Orton for breach of contract and negligence. (R. 157)

Interwest Construction's defense against the primary claim and its prosecution of the negligence counterclaim against Toothman-Orton depended upon obtaining an expert report or affidavit. (R. 157)

On May 2, 2001, the District Court entered summary judgment against Interwest Construction on its negligence cross-claim because Interwest Construction failed to present an expert affidavit showing Toothman-Orton's cross-claim. The Court noted that its "review of the undisputed facts giving rise to the alleged malpractice in this case demonstrates that the matter is not of the kind within the ordinary knowledge and experience of laymen.... Interwest was therefore required to present an expert affidavit to show any negligence by Toothman-Orton. ... Because it failed to do so, summary judgment will be granted in favor of Toothman-Orton on Interwest's negligence cross-claim." (R. 157) Crawley informed Interwest Construction that its counterclaim was dismissed for reasons other than the actual reason. (R. 157)

In September 2001, an Amended Judgment was entered for Toothman-Orton against Interwest Construction in the amount of $17,007.31. (R. 157)

Interwest Construction decided to pursue an appeal. (R. 157) Crawley informed Interwest Construction that the firm would appeal the judgment, and in fact had filed an appeal on its behalf in the Toothman-Orton matter. (R. 157) Crawley did

not file an appeal on behalf of Interwest Construction in the Toothman-Orton matter. (R. 158)

At the time relevant to this proceeding, Crawley was responsible for the firm's business affairs and financial management, including renewing its professional negligence insurance coverage through its insurance company. (R. 158)

In November 2001, Crawley filled out a renewal application and checked the box marked "No" in response to the following question: "At this time, does any applicant know of any act, omission, or circumstance that could reasonably give rise to a professional liability claim against any of the following: the firm, any past or present attorneys in the firm, or any predecessor firm." (R. 158)

The application form asserted "The above statements are true and the Applicant has not misstated, omitted, or suppressed any material fact(s). It is understood and agreed that this Renewal/Anniversary Application and any previously completed Renewal/Anniversary Application(s) and/or Application(s) shall be the basis of the contract with the Company and that this Renewal Anniversary Application, previously completed Renewal/Anniversary Application(s) shall be incorporated into that contract." (R. 158) Crawley signed the application as the "Authorized Principal or Applicant." (R. 158)

Crawley should have been aware that his acts and omissions in representing Interwest Construction in the Pettit Distribution matter and the Toothman-Orton matter

could reasonably give rise to a professional liability claim against the firm and/or against Crawley, but did not disclose this. (R. 159)

Based upon the foregoing facts, the District Court in the disciplinary matter against Crawley concluded that he violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 8.4(c) (Misconduct), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct. (R. 159) It also found that suspension is the appropriate presumptive sanction after taking into consideration the four factors listed under Rule 3 of the Standards for Imposing Lawyer Sanctions. (R. 159)

The court found the following aggravating factors: multiples offenses; the multiple offenses involved elements of intentional dishonesty, either in the form of affirmative misrepresentations, or omissions. (R. 159) Additionally, the court found "a third aggravating circumstance is probably Mr. Crawley's substantial experience." (R. 159)

The court also found the following mitigating factors: Crawley had no other discipline for twenty-eight years; he was suffering from physical, personal, and emotional problems; restitution has been made, albeit after the fact and not on his own initiative; he enjoys a good character reputation in the community by those who he is in a position to know; he has displayed substantial remorse. (R. 159-160)

The Court found two additional factors: Crawley's candor to the court. (R. 160) The court stated that it "thinks he has been absolutely candid and has not done

anything to evade responsibility." (R. 160) Additionally, Crawley suffered a substantial loss of value in the firm, which the court understood to equate closely to restitution. The court also alluded to "the question of the imposition of other penalties and sanctions." (R. 160)

Based on its findings of fact, the court made the following conclusions of law: Crawley violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 8.4(c) (Misconduct), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct. (R. 160) Taking into consideration the four factors listed under Rule 3 of the Standards for Imposing Lawyer Sanctions, suspension is the appropriate presumptive sanction. (R. 160) The court concluded, however, that the suspension should be stayed and Crawley placed on probation, with conditions, for a period of eighteen months. (R. 161) This became the Order of Discipline. (R. 162-164)

SUMMARY OF THE ARGUMENT

In the OPC's view, probation is not an appropriate sanction when an attorney knowingly, or knowingly and intentionally, engaged in professional misconduct involving dishonesty, particularly when there were significant aggravating factors including multiple offenses and dishonest motives. Probation is a sanction that should be reserved for professional misconduct that lends itself to correction, with a respondent willing to cooperate, and not employed for conduct giving rise to questions about the attorney's fundamental integrity.

The Standards for Imposing Lawyer Sanctions ("Standards") identify and define probation as a sanction for professional misconduct, but do not provide guidance concerning when probation may or should be imposed. *Compare* Rule 2, Standards, *with* Rule 4, Standards. The OPC considers probation a useful tool for correcting practice errors that arise from ignorance or lack of diligence or communication. Conversely, the OPC views probation unsuitable as a sanction for conduct involving knowing or intentional dishonesty with clients or courts. Consistent with this approach, the OPC last year determined not to appeal a District Court decision imposing probation in a setting involving negligence.

Recently, however, two District Court decisions have imposed or permitted probation for severe breaches of the attorneys' duties of honesty in various aspects of their practices. Although they differ in their particulars, each of the cases involved the respondent's knowing and intentional dishonesty to clients, third-parties, or to a tribunal. Because of its serious concerns about fairness to respondents and the desirability of promoting consistency in the imposition of disciplinary sanctions for similar offenses, as well as its concerns about protecting the public and the administration of justice, the OPC seeks review of the District Court decision in this case and in *In re Henderson*, which has been consolidated herewith. The OPC asks the Court to articulate criteria for the imposition of probations, thereby providing guidance to the OPC and the District Courts, and urges some particular standards for the Court's consideration. Finally, if the Court concludes that the District Court erred in placing Crawley on probation, it requests that the

Court reverse that portion of the Order, and require Crawley to serve a one-year suspension.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED CONCERNING CRITERIA FOR IMPOSING PROBATIONS

A. Appropriate Sanctions Are the Linchpins of an Effective Attorney Discipline System, and Probation Has Its Place

An effective attorney discipline system depends upon appropriate and consistently applied sanctions for professional misconduct. The American Bar Association's Joint Committee on Professional Sanctions stated it this way:

> For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

I.A., Preface, ABA Standards for Imposing Lawyer Sanctions (as amended Feb. 1992).

In Utah, the explicit purpose of lawyer discipline proceedings "is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Rule 1(a),

Rules of Lawyer Discipline and Disability ("RLDD"); *see also* Rule 1.1, Standards. To this end, the Court adopted the Standards in 1993. *See* Compiler's Notes, Standards.

The Standards constitute a system "designed for use in imposing a sanction or sanctions following a determination that a member of the legal profession has violated a provision of the Rules of Professional Conduct." Rule 1.3, Standards. They allow for "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct" and are designed to promote consideration of all relevant factors and their appropriate weight "in light of the stated goals of lawyer discipline." Rule 1.3, Standards.

B. The Standards Identify Probation as a Possible Sanction, But Provide No Framework Concerning the Circumstances Under Which Probation Is Appropriate

Rule 2 of the Standards is titled "Sanctions," and identifies discipline ranging from the most to the least severe: disbarments, suspensions, reprimands, admonitions. *See* Rule 2, Standards. The list of possible sanctions also includes resignation with discipline pending, reciprocal discipline, and probation. *See id.* Each sanction is defined in the rule, except for a short list of "Other sanctions and remedies" that includes restitution, the assessment of costs, and the like. *See id.* As defined in Rule 2, "Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be public or nonpublic, can be imposed alone or in conjunction with other sanctions, and can be imposed as a condition of readmission or reinstatement." Rule 2.7, Standards.

Another rule in the Standards identifies the circumstances under which disbarments, suspensions, reprimands, and admonitions are the appropriate presumptive

sanction. *See* Rule 4, Standards. Rule 4 does not offer guidance concerning when probation is an appropriate sanction, nor does it identify the circumstances under which the sanctions of resignation with discipline pending and reciprocal discipline should be imposed. *See id.* Procedures for seeking resignations with discipline pending and reciprocal discipline are identified by specific rules in the RLDD, but the RLDD do not address probation. *See* Rule 21 (Resignation with Discipline Pending), RLDD; Rule 22 (Reciprocal Discipline), RLDD. Thus, probation is the only sanction other than the list of "Other sanctions and remedies," with no corresponding rule in the Standards identifying when it is appropriate, or a rule in the RLDD identifying how it may be imposed.

C. Although Probations or Their Equivalent Have Long Been Available in Utah, The Question of When to Impose Them Appears to Be a Matter of First Impression

Probations or their functional equivalent—stayed suspensions[1]—were not explicitly identified among the sanctions noted in the body of rules that preceded today's RLDD and Standards, but were available under the Supreme Court's inherent powers. *See e.g.* Rules of Conduct and Discipline of the Utah State Bar, effective Nov. 1931 (Board of Bar Commissioners could recommend reprimand, suspension, or disbarment, and Supreme Court may exercise its inherent powers and "take any action agreeable to its judgment"); Rules V and VI, section 51, Revised Rules of Professional Conduct of the Utah State Bar,

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[1] Because a stayed suspension with conditions which, if not met, would trigger reinstatement of the suspension, the OPC regards stayed suspensions as the functional equivalent of probations. Courts and other tribunals do not appear to draw a

effective Mar. 1940.

The OPC's review of Supreme Court opinions concerning lawyer discipline revealed only a handful of cases in which probation was imposed or alluded to, but none in which the Court discussed criteria that would make probation an appropriate option. *See e.g. In re Stoddard,* 793 P.2d 373, 374-375, 377 (Utah 1990) (suspension stayed and probation imposed for unintentional lack of diligence, but attorney violated conditions and probation was revoked); *In re Knowlton,* 800 P.2d 806, 807, 809-810 (Utah 1990) (attorney intentionally converted funds belonging to one client as payment for a debt owed by another client; Court imposed six-month suspension, with five months stayed on condition of payment of restitution and costs);[2] *In re Johnson,* 830 P.2d 262, 262-263 (Utah 1992) (opinion alluded to attorney's probation by consent for what appear to have been diligence and communication problems, but probation was revoked and this case involved allegations of attorney practicing while suspended); *In re Schwenke,* 849 P.2d 573, 575 (Utah 1993) (opinion noted Court's acceptance of Bar recommendation to place attorney on supervised probation for neglect of two matters; this case addressed allegations concerning attorney's failure to comply with Court orders); *In re Cassity,* 875

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more rigorous distinction between the two, and this Brief will not attempt to further distinguish them.

[2] Justice Stewart's opinion included a footnote stating that "a six-month suspension, even if five months is stayed, is oppressive and unreasonable." *Id.* at 810 n.5. He added, "Petitioner's conduct is not, in my view, that egregious." *Id.* He also cautioned that "it is ill-advised to impose an over long period of suspension and then stay part of it to gain leverage to compel an attorney to comply with other specific remedies. There are ample means to compel compliance short of that." *Id.*

P.2d 548, 548 (Utah 1994) (public reprimand and six months' probation for case prosecuted as fee dispute).[3]

D. The American Bar Association's Standards for Imposing Lawyer Sanctions Include Probation as a Potential Discipline But Do Not Provide Criteria for Employing It

Utah's Standards are a substantially revised and streamlined version of the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA's Standards"). *See* Summary, Standards; *In re Babilis,* 951 P.2d 207, 212. Their purposes "are nonetheless the same." *Babilis,* 951 P.2d at 212.

The ABA's Standards identify probation among the possible sanctions for professional misconduct. *See* Standard 2.7, ABA Standards for Imposing Lawyer Sanctions, as amended Feb. 1992. The language of the ABA's probation provision differs from the one employed in Utah, but its effect is similar: "Probation is a sanction that allows a lawyer to practice under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement." *Id.* Notably, the ABA Standards do not include a suggested framework for determining when probation is appropriate, nor do they offer guidance concerning how it should be imposed.

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[3] This case is discussed in greater detail below.

E. Probation Is Available In Most Other States, But the Criteria for Imposing It Vary

With some exceptions, the disciplinary rules of other states include probation among the range of sanctions available for attorney misconduct. The OPC has compiled summary information concerning these rules. *See* Summary Chart of State Rules Governing Probations and Stayed Suspensions, a copy of which is provided in the Addendum. Conceptually, the states may be divided into those in which probation is not provided for under the rules governing attorney discipline but the courts sometimes impose it pursuant to their inherent authority; those in which probation is available under conditions specified in the rules; and those, such as Utah, in which probation is explicitly provided for, but no criteria are identified in the rules.

1. Some Jurisdictions Have Rules Permitting Probation Only When Specified Conditions Have Been Satisfied

Jurisdictions with rules permitting probation often identify conditions that must be satisfied before probation can be imposed. These often include a proviso that probation may only be imposed if there is little likelihood of harm to the public. *See e.g.* Rule 8(h), Ala. R. of Disciplinary Pro. Others include a proviso that the conditions of probation must be adequately supervised. *See e.g.* Section 17E(7), Ark. Sup. Ct. Pro. of Regulating Conduct of Attorneys at Law.

Even where probation is permitted under certain conditions, the rules in other jurisdictions usually are silent concerning the underlying misconduct and mental state for which probation may be imposed. The exception is that a handful of rules in other

jurisdictions expressly limit probations to conduct that would not warrant disbarment. *See e.g.* Rule 251.7, Colo. R. Civ. Pro. As far as the OPC can tell, Texas is the only state with more finely calibrated criteria related to the misconduct itself. *See* Rule 15.11, Texas R. of Disciplinary Pro. (probation cannot be used if respondent received public reprimand or fully probated suspension in last five years for same rule violations, or two fully probated suspensions in last five years, or received two public reprimands in last five years for conflict of interest, theft, or failure to return clearly unearned fee).

2. Reported Cases From Other Jurisdictions Sometimes Offer a Useful Perspective on Probation as a Disciplinary Sanction

The OPC's search for reported cases involving probation as a disciplinary sanction revealed numerous cases in which probation was employed without comment from the court concerning the underlying misconduct and attorney's mental state that might warrant such a sanction. Several cases were more helpful in articulating the courts' reasoning, however, and these are summarized here.

In its first such decision, *In re Jantz,* the Supreme Court of Kansas[4] considered whether to stay the suspension of an attorney who converted client funds and lied to a judge about it. *See In re Jantz,* 763 P.2d 626, 772-773 (Kan. 1988) (noting that the court had "not used probation nor have we 'suspended' the execution of such suspension."). Pursuant to the Kansas Supreme Court Rules Relating to Discipline of Attorneys, which provide for disbarment, suspension, censure, or informal admonition,

[4] Kansas is a jurisdiction in which probation is not explicitly provided by rule.

and "[a]ny other form of discipline or conditions separate from or connected to any type of discipline stated above, . . . which the Supreme Court deems appropriate,"[5] the Kansas Supreme Court adopted the hearing panel's recommendation. *See id.* at 775-776. The court emphasized, however, that the case was "unique" because of the many mitigating circumstances,[6] and noted that it had "rarely failed to disbar or suspend any attorney whose professional misconduct parallels that of the respondent." *Id.* at 775. The unique circumstances were these:

> The conduct complained of here took place within a very short period of time; there were no complaints against respondent prior to these incidents. These took place when respondent was under severe emotional distress, caused by the terminal illness of his father and his own financial problems. Mr. Jantz admitted his misconduct to the judge promptly. He has admitted the misconduct to his client and to the bar where he practices. He made prompt restitution of the funds, which were not at that time due the client but were paid by him into the hands of the clerk of the district court, to await further order of the court. By the time the disciplinary proceedings were underway, Jantz had already made restitution, had commenced professional counseling (which is continuing), and had prepared a plan for retirement of his debts and financial obligations. We were told at the time of oral argument that he has made a substantial reduction of his obligations since the panel hearing in March of this year. His practice is growing, indicating that he is accepted by the members of the bench and bar as well as the residents of the community where he resides and practices.

Id.

Since then, the Kansas Supreme Court has rejected other requests for probation, noting that "unique" circumstances are those "from which it reasonably could

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[5] Rule 203(a)(5), Kan. Sup. Ct. R. Relating to Discipline of Attorneys.
[6] Apparently there were no aggravating factors, either.

be inferred that the attorney's misconduct was a one-time response to adversity and that it would be highly unlikely that he would repeat his mistake." *See e.g. In re Scimeca*, 962 P.2d 1080, 1090 (Kan 1998) (indefinitely suspended respondent, among other things, for engaging in conduct prejudicial to the administration of justice and for misconduct in dealing with clients, notwithstanding his contention that he suffers from depression and is treating it, has filed personal and business bankruptcies, his son suffers from a head injury, he apologized to the judge, and the incident involving the judge was isolated).

In New Hampshire,[7] the Supreme Court considered probation for an attorney's trust account violations that involved among other things, commingling and failures to maintain proper trust account records. *See In re Morgan's Case*, 727 A.2d 985, 987 (N.H. 1999). Although the attorney's "apparent ignorance of the rules cannot justify their violation," the court concluded that the mitigating factors included self-reporting, remedial efforts, stipulation to the facts, a lack of prior discipline, and absence of harm, warranted a conditionally delayed suspension. *Id.* The court observed: "It is significant that the respondent's actions were not motivated by dishonesty, *for attorney misconduct involving dishonesty reflects most negatively on the legal profession and will not be tolerated.*" *Id.* (emphasis added).

[7] New Hampshire is a jurisdiction without an explicit rule providing for probation.

In Oregon,[8] the Supreme Court rejected probation for an attorney's intentional dishonesty with a client, noting that a condition of probation is only appropriate when there is a correlation between it and the ethical violation. *See e.g. In re Butler,* 921 P.2d 401, 404 (Ore. 1996). It concluded that "a lengthy suspension will provide greater protection to the public." *Id.* More recently, the Supreme Court of Oregon "advise[d] the Bar that we do not favor probationary terms unless they are the result of stipulation. When a lawyer's misconduct is sufficiently serious to warrant a lengthy probationary period, the uncertainties of the monitoring process lead us to prefer, when appropriate, imposition of a sanction involving a concrete period of time." *In re Obert,* 89 P.3d 1173, 1181 (Ore. 2004).

The Supreme Court of Minnesota[9] may grant probation, but "only [in] the most extreme, extenuating circumstances," such as physical illness that precipitated a severe depressive reaction which was causally related to the misconduct and had been remedied; the misconduct had been rectified; there was no indication of fraud or deceit; the attorney had made significant community contributions, and had no disciplinary history. *See In re McCallum,* 289 N.W.2d 146, 147 (Minn. 1980).

Probation is imposed infrequently in the District of Columbia,[10] and only when the respondent's conduct was influenced by a remediable disability. *See e.g. In re Bradbury,* 608 A.2d 1218, 1219 (D.C. 1992); *see also In re Stow,* 633 A.2d 782, (D.C. 1993)

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[8] Oregon has a rule providing for probation.
[9] Minnesota's rules provide for probation.

(probation appropriate for neglect of practice in light of respondent's acquiescence in sanction)

F. Probation Appears to Be Emerging As a Sanction Imposed Sua Sponte By the District Court

Last year, the District Court imposed a one-year suspension upon an attorney who violated various Rules of Professional Conduct in several client matters, but granted the attorney leave to petition the court to stay all but three months on condition that she undergo supervision for up to nine months. *See* Ruling and Order Re: Sanctions, *In re Lang,* Case Nos. 010910847 and 030908681, March 28, 2005, a copy of which is supplied in the Addendum. The attorney had violated Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct). *See id.* at 1. With the exception of her failure to respond to the OPC, none of the violations were intentional; some violations were knowing, others were merely negligent. *See id.* at 5-9. There were aggravating factors in the form of dishonest and selfish motives as to some misconduct; a pattern of misconduct; multiple offenses; obstruction of the disciplinary process; refusal to acknowledge the wrongful nature of the misconduct; and substantial experience with respect to some matters. *See id.* at 9-12. Mitigating factors were: absence of a prior record (but this was accorded little weight); inexperience as to some of the matters; and interim reform. *See id.* at 12-15. The court found that suspension was the presumptive

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[10] Minnesota's rules provide for probation.

sanction, although it noted that disbarment might be justified and appropriate. *See id.* at 15.

The District Court "wrestled with its options," in the face of "the recurring question [of] just what sanction might give [the attorney] the best possible chance to make fundamental changes that could substantially improve her prospects of practicing law until retirement without being plagued by continuing allegations of professional misconduct." *Id.* at 15. The court explained its reasons for permitting the lawyer to petition for a stay:

> The OPC argues for a suspension of at least six months and one day, but the preferred sanction is a one year suspension. As already indicated, this court does not believe that the presumption of suspension is overcome in this case in any way that would justify the lesser sanctions urged by [the attorney]. Accordingly, the sanction must include suspension, but the court firmly believes that a suspension of six months, or even one year, without a more proactive component, will do anything to change [the attorney's] professional conduct in the long term. There must be a term of actual suspension to bring home the seriousness of this lawyer's misconduct, but the court determines that there must also be a period of supervised practice to give [the attorney] a chance to see how family law can and should be practiced at the highest levels of professional responsibility, with due regard for clients, other counsel, and the courts.

Id. at 15-16. Ultimately, the attorney successfully petitioned for the stay of suspension. *See* Order Staying the Respondent's Suspension and Concerning the Respondent's Reinstatement to the Practice of Law Upon Termination of the Period of Suspension, *In re Lang,* Civil No. 010910847, a copy of which is included in the Addendum.

Although it had urged a sanction other than probation, the OPC concluded the District Court had not erred in imposing the suspension plus probation in the foregoing case. Indeed, the OPC has sometimes stipulated to proposals for a respondent's probation when the misconduct originated from something that clearly could be remedied and the OPC is also persuaded of the attorney's commitment to change and to cooperate. For example, negligent conduct in violation of the rule requiring a lawyer to "provide competent representation to a client;"[11] negligent conduct in violation of the rule requiring lawyers to "act with reasonable diligence and promptness in representing a client;"[12] negligent conduct in violation of the rule requiring a lawyer to keep a client reasonably informed about the status of the matter.[13] In such circumstances, where it appears that appropriate additional training or mentoring would eliminate the problems without further injury to any client, probation is arguably the most effective means of securing long-term protection of the public. Significantly, progress can be reported, measured, and verified if necessary, thereby adequately insuring protection of the public, the courts, and the profession.

G. The OPC Urges the Court to Exercise Its Special Role in Governing the Practice of Law By Providing the Guidance Requested

Pursuant to Utah Constitution, the Supreme Court "plays a special role in governing the practice of law," which "includes overseeing the discipline of persons

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[11] Rule 1.1, R. Pro. Con.
[12] Rule 1.3, R. Pro. Con.
[13] Rule 1.4, R. Pro. Con.

admitted to practice law." *In re Ince*, 957 P.2d 1233, 1236 (Utah 1998). Trial court findings are reviewed under a clearly erroneous standard, but the Court "reserve[s] the right to draw different inferences from the facts than those drawn by the trial court." *Id.* Significantly, "[w]ith respect to the discipline actually imposed, our constitutional responsibility requires [the Court] to make an independent determination as to its correctness." *Id.* In one of the first cases brought under the new disciplinary scheme inaugurated in 1993, the Court said, "Although we recognize as a general proposition the district court's advantaged position in overall familiarity with the evidence and the context of the case, on appeal we must treat the ultimate determination of discipline as our responsibility." *Babilis*, 951 P.2d 207, 213.

The Court has exercised this role in the past by providing guidance concerning how the Standards should be applied. For example, in the *Ince* case, the Court noted that "Although the new Standards are intended to preserve a measure of flexibility in assigning sanctions, the whole basis for their adoption was to avoid the uncertainty that existed under the old rules. Therefore, we offer the following guidance as to the application of aggravating and mitigating circumstances under rule 6 [of the Standards]." *In re Ince*, 957 P.2d 1233, 1236 (Utah 1998) (aggravating and mitigating factors must be significant to warrant departing from presumptive level of discipline set forth in Standards).

Justice Durham's concurring and dissenting opinion in another disciplinary matter, *In re Johnson*, elaborated upon the Court's role in attorney misconduct matters:

> This court is charged by the Utah Constitution with the obligation to regulate the practice of law. We have delegated the screening, fact-finding, and initial judgment regarding discipline to the Utah State Bar and to the district courts, but we retain the final authority to oversee the system. When the prosecuting entity and the disciplined attorney accede to the appropriateness of the disciplinary sanction imposed by the trial courts, or at least fail to challenge it, we lend out constitutional authority to the finality of the determination. Such trial court decisions, of course, create no precedent for the disposition of other cases. Where a sanction is challenged, however, this court undertakes a function that goes beyond the review of an individual case. We arbitrate questions of proportionality, rules of law, and guidelines for the imposition of sanctions that have general application for the practice of law in Utah. Our decisions interpret the Rules of Professional Conduct and develop the principles of application that will guide lawyers, the Bar, and the trial courts.

In re Johnson, 2001 UT 110, ¶ 21 (Durham, J., concurring and dissenting). Justice Durham also noted the trial courts' "more limited perspective on the disciplinary system" and observed that "[i]t is not at all unexpected that a trial judge's best assessment of the trend of developing law turns out to be 'wrong' in the sense that this court will reject it and opt for a different interpretation or policy." *Id.* at ¶ 23.

It is in this spirit that the OPC seeks review of the Crawley case and its companion case, *In re Henderson.* The Court's decision here will have a significant bearing on future disciplinary cases, as well as the cases in issue here.

II. PROBATION SHOULD ONLY BE AVAILABLE FOR MISCONDUCT THAT IS AMENDABLE TO CORRECTION

A. Probation Is an Appropriate Sanction for Some Misconduct

Consistent with the goal of protecting the public and the administration of justice, probation is a means of ensuring that reform has occurred. Likewise, probation imposed

in conjunction with other sanctions and remedies, such as a requirement that the lawyer attend continuing education courses, or work under the supervision of another lawyer,[14] is a significant tool for ensuring and maintaining high standards of professional conduct.[15]

The factors for determining when to use probation are a more difficult question. Rule 4 of Utah's Standards identifies the presumptive sanctions for certain types of misconduct, but does not include probation as an appropriate presumptive sanction. *See* Rule 4, Standards. Accordingly, probation appears to be an appropriate final sanction—that is, a sanction ultimately imposed upon consideration of the factors identified in Rule 3 of the Standards, which include the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and aggravating and mitigating factors—but not a presumptive sanction. *See* Rule 3.1, Standards. Probation, then, is a legitimate ultimate solution, but when should it be imposed?

B. The Factors Identified in Rule 3 of the Standards Should Be Considered in Imposing a Sanction of Probation

Although the Standards are brief, being comprised of just six rules, they are nevertheless loaded with the criteria necessary for promoting a rational and thorough

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[14] Rule 2 of the Standards provides for the imposition of other sanctions and remedies, including "a requirement that a lawyer attend continuing education courses." Rule 2.9, Standards.

[15] The American Bar Association's Standing Committee on Professional Discipline has observed that if probation is not available as a sanction for lawyers in need of supervision but who could "perform useful services," the only choices are "suspension, which involves an unnecessary deprivation of the lawyer's livelihood, or continuation of practice, which involves a possible threat to the public." *Louisiana State Bar Ass'n v. Longenecker*, 532 So.2d 1143, 164 n.1 (La. 1989).

consideration of all relevant factors. Rule 3 is the rule that explicitly draws together these factors:

> The following factors should be considered in imposing a sanction after a finding of lawyer misconduct:
> (a) The duty violated;
> (b) The lawyer's mental state;
> (c) The potential or actual injury caused by the lawyer's misconduct; and
> (d) The existence of aggravating or mitigating factors.

Rule 3.1, Standards. The sanctions of resignation with discipline pending and reciprocal discipline are not governed by Rule 3 because the factors are inapplicable, and they are addressed by explicit separate provisions of the RLDD. By contrast, the factors identified in Rule 3 are readily applicable in probation settings, and probation is not addressed by the RLDD. Accordingly, the Rule 3 factors should be considered in imposing the sanction of probation, and these are discussed below.

Lawyers owe duties to clients, tribunals, the public, and the profession. These are not set forth in the Standards, but are embedded in the Rules of Professional Conduct. For example, duties to clients are inherent in the rules requiring an attorney to provide competent, diligent representation and adequate communication. *See e.g.* Rules 1.1, 1.3, and 1.4, R. Pro. Con. A lawyer has a duty to maintain the integrity of the profession. *See e.g.* Rules 8.1 and 8.3, R. Pro. Con. Of particular significance for this case, a lawyer also owes duties of honesty and candor to tribunals and opposing counsel, as well as a duty of fairness to opposing parties. *See e.g.* Rules 8.4, 4.1, 4.4, R. Pro. Con.

As to the relevant mental states, these are identified and defined in the Standards:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
>
> "Knowledge is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
>
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Definitions, Standards.

Injury may be actual or potential, and its level can range from "serious" to "little or no." *See* Definitions, Standards. Injury and potential injury includes harm to clients, the public, the legal system, or the profession. *See id.*

The Standards set forth a non-exhaustive list of aggravating and mitigating circumstances in Rule 6, and this Court has provided guidance concerning their existence and the weight they should be accorded. *See* Rule 6, Standards; *see also e.g. In re Ince*, 957 P.2d 1233 (Utah 1998).

C. In the OPC's View, Probation Is Not Appropriate When the Respondent Has Intentionally or Knowingly Violated Duties of Honesty and Candor

Employing the Rule 3 factors, the OPC has concluded that probation should not be available as a sanction when the duty violated was the duty to deal honestly with clients, tribunals, or third parties, and when the lawyer's mental state in committing the

misconduct was knowing or intentional. Further, probation is not appropriate when certain aggravating factors are present, a point addressed later.

Any sanction should maintain respect for the profession and protect the public, and should be sufficient to prevent recurrence of the misconduct and deter others from engaging in similar misconduct. Moreover, the degree of discipline must correspond to the gravity of the misconduct. Collectively, the question is whether the discipline is appropriate in light of the nature of the misconduct, the cumulative weight of the disciplinary rule violations, the potential harm to the public, and the harm to the legal profession itself.

With these considerations in mind, probations in disciplinary matters involving an attorney's intentional or knowing dishonesty are inappropriate because the misconduct reflects an absence of integrity that cannot be remedied with further training or supervision. Moreover, a respondent's reform cannot be verified. Indeed, absent 24-hour supervision, a supervising attorney cannot possible know if there have been further misrepresentations or other lapses of integrity.

The OPC's position derives in part from the seriousness with which the Court has treated discipline matters involving an attorney's lack of integrity in a variety of settings. *See e.g. In re Norton,* 146 P.2d 899, 900-901 (Utah 1944) (attorney "charged with an attempt to deceive this court" by intentionally misrepresenting that an exhibit had been admitted in evidence; although attempt was unsuccessful, the Court imposed one-year suspension); *In re Bybee,* 629 P.2d 423, 425 (Utah 1988) (attorney's lack of

truthfulness and candor to a court warranted a suspension; such conduct, "if allowed without proper restraint and punishment, would undermine our system of justice."); *In re Cassity,* 875 P.2d 548, 551 (Utah 1994) (had Cassity's misrepresentation to a court "been charged and prosecuted before the hearing as an independent act of professional misconduct, disbarment or suspension may have been appropriate, but that was not the case."). In his concurring opinion in *Cassity,* Chief Justice Zimmerman wrote,

> Conduct such as Cassity's factual misrepresentation to the court strikes at the heart of the legitimacy of the adversary system. The importance of a lawyer's obligation of candor to the tribunal cannot be overstated. Lawyers have an ethical obligation to be advocates for their clients, not to be their co-conspirators. . . . It would ignore reality to recognize that at times, cultural and economic pressures cause some lawyers to forget the distinction. . . . But when such conduct comes to light, I think it should be punished harshly to serve as continuing notice on errant members of the profession that we will not tolerate it. Severe punishment also assures the public that, despite the cynical teachings of popular culture that lawyers are prostitutes in nice clothing fit only for dinosaur food, in fact, lawyers are bound by rigid ethical standards which are designed to preserve the integrity of the adversary system.

Cassity, 875 P.2d at 552 (citations omitted) (Zimmerman, J., concurring).

D. Probation Should Only Be Available When Certain Aggravating Factors Are Not Present

Additionally, even in cases not involving misconduct based upon an attorney's intentional or knowing violation of duties of honesty, probation would not be appropriate when aggravating factors suggest that the respondent is unlikely to cooperate with the OPC and has not demonstrated the self-awareness that is a necessary component of a true commitment to change. In other words, an attorney whose misconduct was

dishonestly motivated,[16] who denies responsibility,[17] who engages in deceptive practices during the disciplinary proceeding,[18] or who displays an uncooperative attitude toward the proceedings,[19] is an unlikely candidate for the rehabilitative possibilities offered by probation.

III. CRAWLEY SHOULD NOT HAVE BEEN PLACED ON PROBATION GIVEN THE NATURE OF THE DUTIES VIOLATED AND THE AGGRAVATING CIRCUMSTANCES

A. Crawley Intentionally Misled His Client, His Colleagues, and His Firm's Insurance Carrier

Crawley repeatedly violated his duty of honesty to his client, his firm's insurance carrier, and his colleagues at the firm. He misrepresented the status of one matter to the client and to his firm; told the client that another matter was dismissed for reasons other than the actual reason; told the client that a matter had been appealed, when it had not; and in response to a direct question from his firm's insurance carrier, failed to inform the carrier that his acts and omissions could give rise to a professional liability claim. His affirmative representations and omissions were intentionally dishonest. These violations of Rule 8.4(c) of the Rules of Professional Conduct, which provides that it is professional misconduct for a lawyer to "engage in conduct involving

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[16] Rule 6.2(b), Standards (dishonest motive is an aggravating circumstance).
[17] Rule 6.2(f), Standards (refusal to acknowledge wrongful nature of misconduct is an aggravating circumstance).
[18] Rule 6.2(f), Standards (submission of false statements or evidence, or other deceptive practices during disciplinary process is an aggravating circumstance).
[19] Rule 6.2(e), Standards (obstruction of disciplinary proceeding by intentionally failing to comply with rules or orders is an aggravating circumstance).

dishonesty, fraud, deceit or misrepresentation," were failures of an attorney's most fundamental duty to his client and to the profession. Moreover, as the aggravating factors demonstrate, Crawley's motive was dishonest with respect to the misrepresentations and omissions, and there were multiple offenses.

B. The Court Gave Undue Weight to Some of the Mitigating Factors

In the OPC's view, the Court Considered mitigating factors which either should not have been considered, or which were entitled to little if any weight. If these informed its decision to place Crawley on probation, this was in error.

1. Crawley Made Restitution Only After the Fact and Not on His Own Initiative

The District Court found and concluded as a mitigating circumstance that "[r]estitution has been made, albeit after the fact and not on his own initiative." (R. 160) Further, "Crawley has suffered what the Court accepts to be essentially a one hundred and fifty thousand dollar loss of value in the firm. The Court understands this equates very closely to the restitution element." (R. 160)

The OPC believes the court erred in assigning Crawley's restitution and financial loss as a mitigating factor. Restitution is entitled to little weight if it is made, as in this matter, after a respondent's misconduct is discovered. *See Ince*, 957 P.2d at 1238. As this Court has stated, "After an attorney's misconduct is discovered, restitution can be characterized simply as the 'honesty of compulsion' and may be evidence only of the lawyer's ability to raise the money or desire to avoid being disbarred rather than of a

sincere desire to rectify the wrongdoing." *Id.; see also Ennenga*, 2001 UT 111, ¶ 13 (repaying client, though the right thing to do, not accomplished in way that mitigated misappropriation because attorney did it after forced to do so by threat of suit); Rule 6.4(a), Standards ("forced or compelled restitution" is neither aggravating nor mitigating).

2. The Fact That Crawley Did Not Deny Wrongdoing Does Not Constitute Remorse Within the Meaning of the Standards

The District Court found and concluded that Crawley "has displayed substantial remorse." The dialogue between the court and counsel on this point demonstrates, however, that remorse was only evident at trial in the form of the absence of denial by Crawley:

> Ms. Toomey: With respect to remorse, there was no direct testimony of this from Mr. Crawley himself. In any event, the Supreme Court has said that it's entitled to negligible weight because anybody would be remorseful at trial. The question is did he demonstrate it before he got caught and there is no testimony of that. Did he tell anybody before they found out from other sources? He didn't tell the colleagues that he was apparently quite close to[.] [T]hey regarded him as a mentor, so it may not have been appropriate in that context, but he didn't tell his wife.
>
> So I think that the evidence—there isn't any evidence of remorse.
>
> The Court: I mean there clearly is perhaps not beforehand, *but he is remorseful now.* I guess I would say to you that you'd be surprised at the number of people that would take that stand in similar settings and not express any remorse or any belief that they have ever done anything wrong but they're just getting shanked. So, there is, I mean, there is certainly no acknowledgment that what this is[,] ["]It's just the system, you know, I didn't do anything wrong. I don't have any personal responsibility.["] I guess that's my point is that's certainly present.

Ms. Toomey: Correct.

The Court: There's no denial here of any wrongdoing whatsoever.

Ms. Toomey: No, no. That's correct.

(R. 189 at 99-100 (emphasis added))

This Court has indicated that "remorse at trial is irrelevant." *Tanner*, 960 P.2d at 403; *Stubbs*, 974 P.2d at 300. It has explained, "Naturally, anyone going through a trial for [the respondent's] wrongdoing would feel remorse after getting caught. Instead, the remorse question closely relates to acknowledgement of wrongful conduct: did [the respondent] feel remorse about his behavior *before getting caught*, and was he motivated by remorse to make amends?" *Tanner*, 960 P.2d at 403 (emphasis added). Crawley did not deny wrongdoing, but his remorse was evident only after it became clear that his misconduct had been discovered, and made amends "after the fact and not on his own initiative."

3. Crawley's Candor to the Court Is Not a Mitigating Factor

The Court found and concluded that Crawley "has been absolutely candid and has not done anything to evade responsibility." This is not a mitigating factor within the meaning of the Standards. Any witness testifying in court is under oath and expected to be scrupulously honest. As such, a respondent's candor cannot be a mitigating factor; it is his duty.

CONCLUSION

The ultimate responsibility for disciplinary cases lies with this Court, and in light of its unique role in regulating the profession, the OPC asks it for guidance concerning the underlying misconduct and the attorney's mental state for which probation is appropriate. Such guidance will provide enormous assistance to the OPC, the District Court, and future respondents, because it will promote consistency in sanctions for similar types of misconduct.

If the OPC has correctly concluded that probation is inappropriate as a sanction for misconduct involving an attorney's breach of the fundamental duty of honesty to clients and others, the OPC asks the Court to adopt this as a bright-line test for determining the availability of probation.

Additionally, if the Court concludes that the District Court erred in placing Crawley on probation instead of imposing a period of actual suspension, the OPC requests that the Court reverse that portion of the Ruling and Order Re: Sanctions and impose a suspension upon him.

DATED: August 25, 2006.

OFFICE OF PROFESSIONAL CONDUCT

Kate A. Toomey

Kate A. Toomey
Deputy Counsel

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of August, 2006, I caused to be mailed via United States first-class mail, postage pre-paid, two true and correct copies of the foregoing Brief of Appellant to: Gregory Skordas, counsel for the Respondent, Steven Crawley at SKORDAS, CASTON & HYDE, Boston Bldg., Suite 1104, 9 Exchange Place, Salt Lake City, Utah 84111; and John T. Caine, counsel for the Respondent, J. Keith Henderson, at RICHARDS CAINE & ALLEN, PC, 2550 Washington Blvd., Suite 300, Ogden, Utah 84401.

Kate A. Toomey

ADDENDUM

Table of Contents

Rules of Central Importance Cited in the Brief

Rule 2. Sanctions, Standards for Imposing Lawyer Sanctions.

2.1. Scope. A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.

2.2. Disbarment. Disbarment terminates the individual's status as a lawyer. A lawyer who has been disbarred may be readmitted as provided in Rule 25 of the Rules of Lawyer Discipline and Disability.

2.3. Suspension. Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be imposed for a specific period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years.

(a) A lawyer who has been suspended for six months or less may be reinstated as set forth in Rule 24 of the Rules of Lawyer Discipline and Disability.

(b) A lawyer who has been suspended for more than six months may be reinstated as set forth in Rule 25 of the Rules of Lawyer Discipline and Disability.

2.4. Interim suspension. Interim suspension is the temporary suspension of a lawyer from the practice of law. Interim suspension may be imposed as set forth in Rules 18 and 19 of the Rules of Lawyer Discipline and Disability.

2.5. Reprimand. Reprimand is public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.6. Admonition. Admonition is nonpublic discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.7. Probation. Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be public or nonpublic, can be imposed alone or in conjunction with other sanctions, and can be imposed as a condition of readmission or reinstatement.

2.8. Resignation with discipline pending. Resignation with discipline pending is a form of public discipline which allows a respondent to resign from the practice of law while either an informal or formal complaint is pending against the respondent. Resignation with discipline pending may be imposed as set forth in Rule 21 of the Rules of Lawyer Discipline and Disability.

2.9. Other sanctions and remedies. Other sanctions and remedies which may be imposed include:

(a) restitution;
(b) assessment of costs;
(c) limitation upon practice;
(d) appointment of a receiver;
(e) a requirement that the lawyer take the bar examination or professional responsibility examination; and
(f) a requirement that the lawyer attend continuing education courses.

2.10. Reciprocal discipline. Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction.

Rule 3. Factors to Be Considered in Imposing Sanctions, Standards for Imposing Lawyer Sanctions.

3.1. Generally.

The following factors should be considered in imposing a sanction after a finding of lawyer misconduct:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

Rule 4. Imposition of Sanctions, Standards for Imposing Lawyer Sanctions.

4.1. Generally.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.1, the following sanctions are generally appropriate.

4.2. Disbarment.

Disbarment is generally appropriate when a lawyer:

(a) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(b) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(c) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

4.3. Suspension.

Suspension is generally appropriate when a lawyer:

(a) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b) engages in criminal conduct that does not contain the elements listed in Standard 4.2(b) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

4.4. Reprimand.

Reprimand is generally appropriate when a lawyer:

(a) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional

Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(b) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

4.5. Admonition.

Admonition is generally appropriate when a lawyer:

(a) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(b) engages in any professional misconduct not otherwise identified in this Standard 4 that adversely reflects on the lawyer's fitness to practice law.

Rule 6. Aggravation and Mitigation, Standards for Imposing Lawyer Sanctions.

6.1. Generally.

After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.

6.2. Aggravating circumstances.

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating circumstances may include:

(a) prior record of discipline;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and

(k) illegal conduct, including the use of controlled substances.

6.3. Mitigating circumstances.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating circumstances may include:

(a) absence of a prior record of discipline;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify the consequences of the misconduct involved;

(e) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) good character or reputation;

(h) physical disability;

(i) mental disability or impairment, including substance abuse when:

(1) The respondent is affected by a substance abuse or mental disability; and

(2) The substance abuse or mental disability causally contributed to the misconduct; and

(3) The respondent's recovery from the substance abuse or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) The recovery arrested the misconduct and the recurrence of that misconduct is unlikely;

(j) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay;

(k) interim reform in circumstances not involving mental disability or impairment;

(l) imposition of other penalties or sanctions;

(m) remorse; and

(n) remoteness of prior offenses.

6.4. Factors which are neither aggravating nor mitigating.

The following circumstances should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;

(b) withdrawal of complaint against the lawyer;

(c) resignation prior to completion of disciplinary proceedings;

(d) complainant's recommendation as to sanction; and

(e) failure of injured client to complain.

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of: Steven Crawley, #00750 Respondent.	AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISCIPLINE Civil No. 040905620 Judge Denise P. Lindberg

This matter came on for a combined Adjudication and Sanctions Hearing on Monday, November 7, 2005. The Office of Professional Conduct ("OPC") was represented by Kate A. Toomey, Deputy Counsel. The Respondent, Steven Crawley, was present and represented by his attorney, Gregory G. Skordas. The parties had previously stipulated that the matter could be tried as a combination Adjudication and Sanctions Hearing. Additionally, the parties entered into Stipulated Facts, which are adopted and incorporated herein, prior to the commencement of the hearing.

The Office of Professional of Conduct called one witness at the hearing: the Respondent, Steven Crawley. The Respondent called the following witnesses: Darrel J. Bostwick, Attorney-at-Law; Charlene Crawley, wife of the Respondent; Steven Crawley, the Respondent; Jeffery Price, Attorney-at-Law; and Dr. Lynn Johnson, PhD, a psychologist who treated the Respondent. Additionally, the Respondent proffered the character testimony of attorney Randy Birch, and the similar testimony of Stella Allen, director of Habitat for Humanity.

After hearing the testimony and the arguments of counsel, the Court hereby enters the following:

STIPULATED FACTS

1. Steven Crawley is an attorney licensed in the State of Utah and a member of the Utah State Bar.

2. At the time relevant to this proceeding, Mr. Crawley was a shareholder of the law firm Babcock, Bostwick, Scott, Crawley and Price ("the firm").

3. One of the firm's clients was Interwest Construction.

4. Crawley represented Interwest Construction in two matters relevant to this Complaint – Case One, denominated Pettit Distribution Centers v. Interwest Construction, Case No. 000902176, Third Judicial District Court ("the Pettit Distribution matter"), and Case Two, denominated Toothman-Orton Engineering v. Interwest Construction, Case No. 1:99CV438, United States District Court for the District of Idaho ("the Toothman-Orton matter").

5. The Pettit Distribution matter involved a primary claim against Interwest Construction, and Interwest Construction's three third-party claims against Messerly Concrete, Western States Waterproofing, and Chemrex.

6. Interwest Construction's primary claim and the third-party claims in the Pettit Distribution matter would have been enhanced by obtaining an expert report or affidavit.

7. Crawley failed to obtain an expert report or affidavit for the Pettit Distribution matter.

8. In the Fall of 2001 in the Pettit Distribution matter, Interwest Construction lost some of its third-party claims for lack of any supporting evidence, including an expert report.

9. The District Court assessed attorneys' fees against Interwest Construction in two third-party claims in the Pettit Distribution matter.

10. Crawley failed to inform Interwest Construction that its third-party claims were dismissed, and that attorneys' fees had been assessed against it in the Pettit Distribution matter.

11. In the Pettit Distribution matter, the District Court granted partial summary judgment against Interwest Construction in March 2002, and the lack of an expert report was part of the reason.

12. Crawley misrepresented the status of the Pettit Distribution matter to Interwest Construction.

13. Crawley misrepresented the status of the Pettit Distribution matter to the firm.

14. The Toothman-Orton matter involved an action against Interwest Construction for breach of contract.

15. Interwest Construction counterclaimed against Toothman-Orton for breach of contract and negligence.

16. Interwest Construction's defense against the primary claim and its prosecution of the negligence counterclaim against Toothman-Orton depended upon obtaining an expert report or affidavit.

17. On May 2, 2001, the District Court entered summary judgment against Interwest Construction on its negligence cross-claim because Interwest Construction failed to present an expert affidavit showing Toothman-Orton's cross-claim. The Court noted that its "review of the undisputed facts giving rise to the alleged malpractice in this case demonstrates that the matter is not of the kind within the ordinary knowledge and experience of laymen.... Interwest was therefore required to present an expert affidavit to show any negligence by Toothman-Orton. ... Because it failed to do so, summary judgment will be granted in favor of Toothman-Orton on Interwest's negligence cross-claim."

18. Crawley informed Interwest Construction that its counterclaim was dismissed for reasons other than the actual reason.

19. In September 2001, an Amended Judgment was entered for Toothman-Orton against Interwest Construction. The total amount of the judgment was $17,007.31.

20. In the Toothman-Orton matter, Interwest Construction decided to pursue an appeal.

21. Crawley informed Interwest Construction that the firm would appeal the judgment, and in fact had filed an appeal on its behalf in the Toothman-Orton matter.

22. Crawley did not file an appeal on behalf of Interwest Construction in the Toothman-Orton matter.

23. At the time relevant to this proceeding, Crawley was responsible for the firm's business affairs and financial management, including renewing its professional negligence insurance coverage.

24. The firm was insured through Medmarc Casualty Insurance Company.

25. In November 2001, Crawley filled out an application captioned "ProMarc Renewal Anniversary Application."

26. Crawley checked the box marked "No" in response to the following question from Medmarc Casualty Insurance Company: "At this time, does any applicant know of any act, omission, or circumstance that could reasonable give rise to a professional liability claim against any of the following: the firm, any past or present attorneys in the firm, or any predecessor firm."

27. The application form asserted "The above statements are true and the Applicant has not misstated, omitted, or suppressed any material fact(s). It is understood and agreed that this Renewal/Anniversary Application and any previously completed Renewal/Anniversary Application(s) and/or Application(s) shall be the basis of the contract with the Company and that this Renewal Anniversary Application, previously completed Renewal/Anniversary Application(s) shall be incorporated into that contract."

28. Crawley signed the application as the "Authorized Principal or Applicant."

29. Crawley should have been aware that his acts and omissions in representing Interwest Construction in the Pettit Distribution matter and the Toothman-Orton matter could reasonably give rise to a professional liability claim against the firm and/or against Crawley.

30. Crawley did not disclose to Medmarc Insurance Company that his acts and omissions in representing Interwest Construction in the Pettit Distribution matter and the Toothman-Orton matter could reasonably give rise to a professional liability claim against him or the firm.

ADDITIONAL FINDINGS OF FACT

31. Mr. Crawley violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 8.4(c) (Misconduct), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

32. Suspension is the appropriate presumptive sanction after taking into consideration the four factors listed under Rule 3 of the Standards for Imposing Lawyer Sanctions.

33. The aggravating factors are:

a. Multiples offenses.

b. The multiple offenses involved elements of intentional dishonesty, either in the form of affirmative misrepresentations, or omissions.

c. In addition, a third aggravating circumstance is probably Mr. Crawley's substantial experience.

34. The mitigating factors are:

a. The absence of any other discipline for twenty-eight years.

b. Mr. Crawley was suffering from physical, personal, and emotional problems. The Court understands this conflates two of the mitigating factors.

c. Restitution has been made, albeit after the fact and not on his own initiative.

d. Mr. Crawley enjoys a good character reputation in the community by those who he is in a position to know.

e. Mr. Crawley has displayed substantial remorse.

35. Two other factors that are not expressly listed are:

a. Mr. Crawley's candor to the court. The Court thinks he has been absolutely candid and has not done anything to evade responsibility.

b. Mr. Crawley has suffered what the Court accepts to be essentially a one hundred and fifty thousand dollar loss of value in the firm. The Court understands this equates very closely to the restitution element.

c. Then there is the question of the imposition of other penalties and sanctions.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby makes the following Conclusions of Law:

1. Mr. Crawley violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 8.4(c) (Misconduct), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

2. The Court concludes that suspension is the appropriate presumptive sanction after taking into consideration the four factors that are listed under Rule 3, Standards for Imposing Lawyer Sanctions.

3. There are several aggravating factors and several mitigating factors that apply in this case in various degrees, as set forth above.

3. The Court concludes that Mr. Crawley should be suspended for one year, but to stay that suspension and place him on probation for a period of eighteen months with the following conditions:

a. Mr. Crawley's conduct should be subject to public disclosure in the Discipline Corner that reflects the determinations that have been made, and what the violations are.

b. Mr. Crawley should not engage in any litigation during that period of time, nor enter any appearance in court.

c. Mr. Crawley should not advertise at all during that period of time as well.

d. Mr. Crawley should donate twenty-five hours of pro bono time to clients, or Bar-related community service, either through Tuesday Night Bar or some other organization as mutually agreed-upon by counsel for the parties.

e. Mr. Crawley should obtain an evaluation. He should be seen by a mental health professional of his choice—a doctor he's seeing now or perhaps he's seen in the past—every four months so we will have four reports

during the period of the suspension. The first one will take place not later than thirty days from the date of this hearing, with a report from Dr. Johnson, or whoever it is, to the OPC.

f. If there is a diagnosis or determination that Mr. Crawley has slipped into anxiety or depression, he must bring it to the OPC's and the Court's attention to be addressed at that point. The Court is not suggesting that the suspension will take place, because that is not its intent, only that it be monitored to prevent Mr. Crawley from slipping into some episode without anybody monitoring what is happening.

g. Mr. Crawley should commit no further violations of the Rules of Professional Conduct.

h. Within six months of the date of the sanctions hearing, Mr. Crawley should take and pass the Multi-state Professional Responsibility Examination.

ORDER OF DISCIPLINE

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters its Order of Discipline:

1. Mr. Crawley shall be suspended from the practice of law for a period of one year.

2. The suspension shall be stayed, and Mr. Crawley placed on probation for a period of 18 months under the following terms and conditions:

a. Mr. Crawley's conduct shall be subject to public disclosure in the Discipline Corner that reflects the determinations that have been made, and what the violations are.

b. Mr. Crawley shall not engage in any litigation during that period of time, nor enter any appearance in court.

c. Mr. Crawley shall not advertise at all during that period of time as well.

d. Mr. Crawley shall donate twenty-five hours of pro bono time to clients, or Bar-related community service, either through Tuesday Night Bar or some other organization as mutually agreed upon by counsel for the parties.

e. Mr. Crawley shall obtain an evaluation. He shall be seen by a mental health professional of his choice—a doctor he's seeing now or perhaps he's seen in the past—every four months. The first one shall take place not later than thirty days from the date of the hearing, with a report from Dr. Johnson, or whoever it is, to the OPC.

f. If there is a diagnosis or determination that Mr. Crawley has slipped into anxiety or depression, he shall bring it to the OPC's and the Court's attention to be addressed at that point.

g. Mr. Crawley shall commit no further violation of the Rules of Professional Conduct.

h. Within six months of the date of the sanctions hearing, Mr. Crawley shall take and pass the Multi-state Professional Responsibility Examination.

3. At the expiration of the probationary period, Mr. Crawley shall file a petition pursuant to Rule 25, Rules of Discipline and Disability, and the OPC will have the opportunity to respond.

4. Any future complaints against Mr. Crawley shall come directly to the Court's attention without proceeding through a Screening Panel hearing.

ENTERED this 2nd day of May 2006.

BY THE COURT:

Honorable Denise P. Lindberg
Third District Court Judge

Approved as to form:

Gregory G. Skordas
Counsel for Respondent, Steve Crawley

MAILING CERTIFICATE

I hereby certify that on the _____ day of April, 2006 a true and correct copy of the foregoing was sent via prepaid first-class U.S. Postal Service to the following:

Gregory G. Skordas (#3865)
SKORDAS, CASTON, HAMILTON & HYDE
Suite 1104 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:	RULING AND ORDER RE: SANCTIONS
MARSHA M. LANG, #4995	CASE NOS. 010910847 030908681
Respondent.	Judge Robert K. Hilder

The first phase of this bifurcated proceeding was tried to the Court on November 17, 18 and 19, and December 14, 2004. Findings of Fact and Conclusions of Law were entered on December 20, 2004. The court found that Ms. Lang had violated several Rules of Professional Conduct, as follows: Rule 1.3 (diligence) as to the Elsbury and Burch-Knowley matters; Rule 1.4(b) (communication) as to the Elsbury, Willcut, and Burch-Knowley matters; Rule 1.4(a) (communication) as to the Willcut and Burch-Knowley matters; Rule 8.1(b) (failure to respond to the office of Professional Conduct regarding complaints) in the Willcut and Burch-Knowley matters; Rule 8.4(d) (conduct prejudicial to the administration of justice, in this case during the course of a deposition) in the Kelley matter; and Rule 8.4(a) in all four matters, based on the findings of other, specific, violations of the Rules of Professional Conduct.

After the court entered its Findings and Conclusions, the

court commenced the sanctions hearing on January 13, 2005, within the thirty days required by Rule 11(f), Rules of Lawyer Discipline and Disability, but the time set aside for hearing proved inadequate. The sanctions phase was ultimately heard over several days, concluding with the last arguments on March 22, 2005. Prior to closing arguments, five witnesses were examined. The Office of Professional Conduct was represented by Kate A. Toomey, and respondent was represented by Andrew B. Berry. Based upon the testimony of the witnesses during both phases of this proceeding, the court's Findings and Conclusions, the arguments of counsel, and the Standards for Imposing Lawyer Sanctions, and applicable case law, the Court now enters its following Ruling and Order imposing sanctions against Ms. Lang as a result of the violations previously adjudicated:

Pursuant to the Standards: "A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer had engaged in professional misconduct." Rule 2.1. As indicated above, in this case the determination of violations is based on this court's Findings and Conclusions, and not on any acknowledgement by Ms. Lang. It is true that, during the course of the sanctions hearing, acting through counsel, Ms. Lang generally accepted the findings without further argument. Nevertheless, to the extent there was any acknowledgement, it occurred only after the court entered adverse findings, and such acknowledgement cannot

be considered in mitigation of the violations for sanctions purposes.

The factors the court must consider in imposing sanctions are set forth in Rule 3.1. They are: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. The court believes that these factors, in the order stated, are a useful framework for consideration of the appropriate sanction(s) in this case:

(a) The duty (duties) violated.

The duties violated are set forth above in summary, and in detail in the court's Findings of Fact and Conclusions of Law entered December 20, 2004. They will not be repeated in detail here, except as necessary to explain the court's Ruling and Order below.

(b) The lawyer's mental state, and

(c) The potential or actual injury caused by the lawyer's misconduct.

Three mental states (intent, knowledge, and negligence) may be considered pursuant to the Standards, and the determination of which applies has a significant bearing on the presumptive sanction for the violation(s), as does the injury factor. The three mental states are defined in the Standards as follows:

"Intent" is the conscious objective or purpose to accomplish

a particular result.

"Knowledge" (or "knowing") is the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The Standards also provide definitions for injury and potential injury, as follows:

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

The court has very carefully considered the mental state to be ascribed to Ms. Lang for each of the adjudicated violations, and the injury or potential injury resulting therefrom, if any. No one

mental state applies to all occurrences under the facts of Ms. Lang's violations. The court first determines that, with the exception of the two violations regarding non-responsiveness to the OPC, none of the violations includes conduct that could fairly be deemed intentional. The court will now consider the mental state and resulting injury, if any, of each violation, by complainant:

In the **Elsbury** matter the court cannot determine that there is sufficient evidence to find that the initial failure to locate and forward income verification, etc. was knowing. It is clear; however, that in light of the evidence, there was a substantial risk that the result would follow from Ms. Lang's failure to carefully investigate her files and question her staff, and it was manifestly negligent conduct that resulted in actual injury to the client (the Order to Show Cause hearing regarding failure to produce documents as ordered) as well as potential injury, had Judge Henriod found contempt, which would probably have occurred but for the judge's active questioning at the hearing (which constituted an intervening factor or event).

On the other hand, Ms. Lang's abandonment of her client at the hearing on Order to Show Cause, when she sought to deflect any blame from herself or her office, and place it on her client, was knowing; that is, the conduct reflected a conscious awareness of the facts and circumstances, but the court nevertheless does not find a conscious purpose to abandon or harm the client; therefore,

intent is not present. Finally, as to Mr. Elsbury, the court determines that Ms. Lang negligently failed to inform him of his options such that he could make appropriate decisions, particularly regarding representation, and that this failure created significant potential harm that would likely have become actual injury, but for Judge Henriod's insistence that Ms. Lang represent Elsbury at the hearing. The representation did not, in fact, substantially aid Mr. Elsbury, but Ms. Lang's presence helped Judge Henriod understand the circumstances and fairly allocate fault for the failure to provide documents as ordered.

Ms. Lang's violations in the **Willcut** matter were primarily knowing. Despite Ms. Lang's testimony, the court is persuaded that she knew that she failed to respond to repeated requests for information, and that she did not keep Ms. Willcut informed sufficiently (with or without inquiry) to permit the client to make informed decisions. The unusual feature of the Willcut matter is that there is no evidence of actual injury, and given the conflicting client instructions, shifting objectives, and inconsistencies in Ms. Willcut's claims regarding the underlying facts, the court cannot determine even potential injury resulting from Ms. Lang's omissions.

The **Kelley** matter, which resulted in the court's determination that Ms. Lang's conduct during the deposition of her client was prejudicial to the administration of justice, was clearly a knowing

act. Ms. Lang claimed both ignorance of the rules of conducting depositions (based on inexperience) and misunderstanding of the state of the law on some specific issues. That may be so, but Ms. Lang was inescapably aware of the nature and circumstances of her conduct, as the deposition deteriorated into an unproductive and argumentative exercise, even if she did not consciously desire that result at the outset. The conduct resulted in actual harm, in that the deposition had to be taken again (part of the cost of which was ultimately borne by Ms. Lang pursuant to court order), and actual harm to the client (both Ms. Lang's and the opposing party), the legal system and the profession, both of which were cast in an unnecessarily bad light.

The **Burch-Knowley** matter encompasses several violations. The failure to move the matter to a conclusion, when it could have been accomplished months earlier but for Ms. Lang's refusal to cooperate in providing minimal legitimate discovery to the other side, was a knowing act, but one which did not intend the resulting delay. Ms. Lang did intend to be obdurate, because she resented opposing counsel's request, but that still does not evince an intent to cause delay. Nevertheless, delay inevitably occurred, and Ms. Lang must have known of the circumstances that led to the delay.

While Ms. Lang was engaging in conduct that created delay, she was knowingly not responsive to her client and she did not provide information, particularly between late November, 2001, and March,

2002, that either informed her client of the status of the matter or permitted the client to make decisions consistent with the existing circumstances. All of the foregoing violations resulted in actual injury to the client, primarily delay in obtaining increased child support, as well as injury to the profession, insofar as the opposing counsel was placed in an impossible situation with his client, resulting in a loss of confidence and termination before the matter concluded, and the reputation of the profession suffered significantly in the eyes of both parties and also the spouse of the child's father.

In both the **Willcut** and **Burch-Knowley** matters, the court further finds that the failure to respond to the OPC requests for information and answers to complaints was intentional. The court recognizes that as Ms. Lang's problems multiplied, she came to believe that responses were futile (in fact, she apparently clings to that belief to this day), but this conscious belief only supports the finding that Ms. Lang accordingly made a conscious decision to not respond.

Finally, the court has not addressed the inevitable findings of violations of Rule 8.4(a), which follow from the findings of other, more specific, misconduct. The court believes that it is not necessary to assign a mental state to these violations, but if one is required, in each instance the mental state should comport with the mental state assigned to the underlying misconduct.

In summary, the court finds that failure to respond to the OPC was intentional, most of the remaining violations were knowing, but some were merely negligent, as set forth in detail above. In all but the Willcut matter, the violations created both actual or potential injury, and the existence of actual injury predominates.

The court has found all three mental states, ranging from intentional (but only for the failures to respond to the OPC which, while important, occurred after the underlying violations), to negligent, but the most prevalent state is knowledge, or knowing. The court has also found both actual and potential injury in all but one matter. Accordingly, the presumptive sanction is suspension, and the court must now proceed to consider aggravating and mitigating factors that may enhance or reduce the presumptive sanction.

(d) The existence of aggravating and mitigating circumstances.

The Office of Professional Conduct argues several instances of aggravating conduct, and concedes some mitigation. Ms. Lang, of course, argues substantial mitigation, and suggests that the only possible aggravating factor is that there are four cases at issue, but she nevertheless argues that these four cases do not establish a pattern of misconduct. The court has carefully considered the arguments of both counsel, but in the interests of brevity, the court will address only those factors which it deems to be truly in controversy.

1. Aggravating factors.

The court will first address factors listed in the Standards, in the order listed, then consider any additional factors:

- **Dishonest or selfish motive.** The court is persuaded that Ms. Lang was dishonest in her excuses proffered to Paula Willcut; dishonest in her blaming actions directed against opposing counsel, primarily Joseph Bean; and selfish in her candidly stated intent to protect herself at Mr. Elsbury's expense in the hearing before Judge Henriod. The court does not identify any other specifically dishonest or selfish motive or conduct.

- **Pattern of misconduct.** If four cases in which violations are found (extending over a period of four to five years) do not constitute a pattern, the court is not sure what would be required. More to the point, the pattern is of similar misconduct, including failure to communicate, blaming of clients and opposing counsel, and refusal to accept responsibility for the lawyer's own actions.

- **Multiple offenses.** See the preceding paragraph.

- **Obstruction of the disciplinary process, etc.** The court's findings of non-responsiveness in at least two cases, and Ms. Lang's admission that she still believes any response and cooperation with the OPC to be futile establish this factor beyond question.

- **Refusal to acknowledge the wrongful nature of the misconduct, either to the client or the disciplinary authority.**

The record fully supports such refusal to acknowledge, at least until after the court determined certain specific violations, and even then the acknowledgements were limited. The greater concern for the court, as will be addressed more fully below, is that even when Ms. Lang appears to have a will to acknowledge and address problems in her professional performance, she appears to lack critical insight into her own conduct and the thought processes that have created, and to some extent, justified the conduct (that is, in Ms. Lang's mind).

- **Substantial experience in the practice of law.** This is a problematic factor. Ms. Lang now has nineteen years of practice. She practiced ten or eleven years before the first violation, but it is also true that Ms. Lang had very limited experience (at least in 1997) in the areas of practice, and in the specific practice activities, involved in the violations. By 2001; however, when several relevant events occurred, Ms. Lang's experience was considerably greater, and she had focused exclusively (as she still does) in family law, and she should be held to the standard of an experienced family law practitioner with respect to at least the Burch-Knowley and Paula Willcut matters.

- The foregoing are factors drawn from the Standards, but the court finds that the most troubling aggravating factor is Ms. Lang's manifest inability to understand some of the more fundamental issues involved in her misconduct. As will appear in

the mitigation section, below, the court notes and commends Ms. Lang for systemic changes that will undoubtedly prevent recurrence of some of the violations, but those violations that arise from lack of understanding of the advocate's role, a professional's duty to put the client's interests above her own, and the professional obligation to be candid and courteous with opposing counsel (and not engage in dishonest or otherwise improper blaming behavior) are troubling characteristics that will need more than systemic remedies.

2. The existence of mitigating circumstances.

- **Absence of a prior record of discipline.** There is no prior record, but this factor cannot be given great weight, because (1) Ms. Lang's practice in family law was relatively new when the first instance occurred, and (2) even this case, involving multiple violations, is a consolidation of two separate District Court filings. Accordingly, had the actions remained separate, at least the violations in the later filing would have been preceded by an earlier record of discipline.

- **Inexperience in the practice of law.** This factor probably applies fairly to the Kelley matter, and to a lesser extent to the Elsbury matter, but not to the later violations. The court also notes that the inexperience of opposing counsel in the Kelley deposition, and her sometimes provocative conduct, are factors that the court weighs in considering any sanction related to that

matter.

– **Unreasonable delay in proceedings**. The court only addresses this factor because it was urged by Ms. Lang's counsel throughout the proceedings. Delay can only refer to the Kelley matter, and the court finds that all proceedings were timely initiated and no prejudice resulted to Ms. Lang from the fact that the matter was not ultimately adjudicated until more than seven years after the deposition. First, the initial delay resulted from Ms. Kelley's reasonable decision to delay a disciplinary complaint until the underlying litigation was concluded. Second, the OPC acted with reasonable speed and within all time limits imposed by statute and rule. Third, ultimate disposition was significantly delayed by Ms. Lang's own actions, including self-representation, dilatory discovery, and consolidation of cases at her request. Finally, the sole factual predicate was conduct during one deposition in 1997. All parties and the court had benefit of the transcript as a full record, and all attorneys present at the deposition (Ms. Lang, her associate, Ms. Hayes, and Ms. Kelley) testified in court, and each had a clear recollection of the incident; therefore, no prejudice was shown.

– **Interim reform**. As is alluded to above, Ms. Lang has made substantial, and apparently effective, systemic changes. Those changes include a message response and documentation protocol, improved calendaring, and specific procedures regarding withdrawal

as counsel. These steps are genuine and commendable, and the court determines that it is unlikely that most of the communication or withdrawal of counsel problems will recur. The court makes this statement mindful of the testimony of David Lee, because even Mr. Lee, who is unapologetically adverse to Ms. Lang, conceded that she responded to all messages by at least the second request. In addition, Ms. Lang's billing records and her file in the Lee matter confirmed that messages were carefully documented and promptly returned.

In addition to systemic changes, Ms. Lang has attended the OPC ethics school, and also attended continuing legal education regarding deposition practice, but as addressed in the next paragraph, it appears to this court that not all lessons were well learned.

- **Imposition of other penalties or sanctions**. Ms. Lang was sanctioned by the trial judge for her conduct in the Kelley matter, and that sanction should have acted as a caution regarding conduct in future depositions. After reviewing the much more recent Marlise Smith deposition (July 21, 2004), the court is persuaded that some improvement has occurred, but viewed as a whole, the Janaka deposition (at issue in the Kelley matter) and the Marlise Smith deposition show a continuing failure on Ms. Lang's part to understand both the rules of defending a deposition, and perhaps even more importantly, the rules and expectations of professional

civility. It appears that the trial court sanctions in the Kelley matter taught a very narrow lesson, at best.

- **Remorse.** Ms. Lang points to her remorse, but her counsel had to concede that remorse delayed until trial is not a legitimate factor in mitigation, and that is the only remorse the court observed.

SUMMARY AND ORDER

After weighing the aggravating and mitigating circumstances addressed above, the court determines that there is no basis for a lesser sanction than the suspension presumed by the Standards. On the other hand, based on the aggravating factors, and the court's specific concern that beyond systemic adjustments, Ms. Lang appears unlikely to address the core, underlying professional failings that brought her to this point, disbarment might be justified and appropriate. In fact, as the court has wrestled with its options, the recurring question is just what sanction might give Ms. Lang the best possible chance to make fundamental changes that could substantially improve her prospects of practicing law until retirement without being plagued by continuing allegations of professional misconduct?

The OPC argues for a suspension of at least six months and one day, but the preferred sanction is a one year suspension. As already indicated, this court does not believe that the presumption of suspension is overcome in this case in any way that would

justify the lesser sanctions urged by Ms. Lang. Accordingly, the sanction must include suspension, but the court firmly believes that a suspension of six months, or even one year, without a more proactive component, will do anything to change Ms. Lang's professional conduct in the long term. There must be a term of actual suspension to bring home the seriousness of this lawyer's misconduct, but the court determines that there must also be a period of supervised practice to give Ms. Lang a chance to see how family law can and should be practiced at the highest levels of professional responsibility, with due regard for clients, other counsel, and the courts.

With the foregoing in mind, and consistent with the Standards for Imposing Lawyer Discipline, as addressed in detail herein, the court now makes and enters its following:

ORDER, suspending respondent Marsha M. Lang from the practice of law in the State of Utah for a period of twelve months, effective May 15, 2005 (to allow winding up, pursuant to Rule 26, Rules of Lawyer Discipline and Disability). The court is, at this time, imposing the entire twelve months' suspension, but Ms. Lang is hereby granted leave to petition the court to stay all but three months of the suspension, on the following conditions: That Ms. Lang, at her expense, retain an experienced member of the Utah State Bar, who is generally experienced in litigation, and specifically experienced in family law, to act as supervisor and

mentor for a period of up to nine months. The supervision shall include one-on-one counseling regarding practice matters, review of files, participation in court and discovery procedures, review of documents prepared by Ms. Lang, including specifically correspondence to opposing counsel, and review of all aspects of Ms. Lang's practice. It is anticipated that the lawyer selected (who must be approved by this court[1]) shall spend approximately four hours per week with Ms. Lang (as an average), for up to nine months, but the specific time shall ultimately be at the discretion of the supervising lawyer, and at a rate of compensation to be agreed between Ms. Lang and the lawyer. If Ms. Lang chooses not to petition for a stay, she shall serve the full suspension.

At the end of the suspension period, Ms. Lang may petition for reinstatement pursuant to Rule 26, Rules of Lawyer Discipline and Disability.

The court intends that this Ruling and Order shall be the final Order of the court, but either the OPC or Ms. Lang may request the court for any modification or clarification that either may think necessary to comply with all applicable Rules or to

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[1] The court will stringently consider the qualifications of any prospective supervising lawyer. If Ms. Lang wishes, the court is willing to provide a list of possible candidates. These names will not be persons the court has contacted, but merely experienced family law practitioners in whom the court reposes confidence based on experience.

effect the court's purpose as set forth herein.

Dated this 29th day of March, 2005.

ROBERT K. HILDER
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010910847 by the method and on the date specified.

METHOD	NAME
Mail	ANDREW B BERRY ATTORNEY DEF 39 W MAIN ST POB 600 MORONI, UT 84646
Mail	MARY KATE A TOOMEY ATTORNEY PLA OFFICE OF PROFESSIONAL CONDUCT 645 S 200 E SALT LAKE CITY UT 84111

Dated this 29th day of March, 2005.

Deputy Court Clerk

Kate A. Toomey, #6446
Deputy Counsel
OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:	)	**ORDER STAYING THE RESPONDENT'S SUSPENSION AND CONCERNING THE RESPONDENT'S REINSTATEMENT TO THE PRACTICE OF LAW UPON TERMINATION OF THE PERIOD OF SUSPENSION**
Marsha M. Lang, #4995	)	**Civil No. 010910847**
Respondent.	)	**Judge Robert K. Hilder**

The matter of the Respondent's Verified Petition for Stay of Suspension and Imposition of Supervised Practice came on for hearing before the Court on July 26, 2005. The Respondent, Marsha M. Lang, was present and represented by Andrew Berry; the Utah State Bar's Office of Professional Conduct ("OPC") was represented by Kate A. Toomey. The Court having read the Verified Petition, the response filed by the OPC, and the Reply to the OPC's Response to Petition for Stay and Supervised Practice submitted by Ms. Lang, and being fully advised in the premises, does hereby enter its ORDER:

1. The effective date of Ms. Lang's twelve-month suspension is May 1, 2005.

2. The Court hereby stays nine months of Ms. Lang's twelve-month suspension, commencing August 1, 2005, upon the following conditions:

a. During the nine-month period, Ms. Lang shall at her own expense retain Gary Howe to act as Ms. Lang's supervisor and mentor.

b. The supervision shall include one-on-one counseling regarding practice matters, review of files, participation in court and discovery procedures, review of documents prepared by Ms. Lang, including specifically correspondence to opposing counsel, and review of all aspects of Ms. Lang's practice.

c. It is anticipated that Mr. Howe shall spend approximately four hours per week with Ms. Lang (as an average), for nine months, but the specific time shall ultimately be at the discretion of Mr. Howe, and at a rate of compensation to be agreed between Ms. Lang and Mr. Howe.

3. The OPC shall publish notice in the next *Utah Bar Journal* that Ms. Lang's suspension has been stayed subject to the conditions identified above.

4. Ms. Lang may petition for reinstatement to the practice of law pursuant to Rule 25, Rules of Lawyer Discipline and Disability ("RLDD"), except that the Court hereby abates the requirement that a suspended respondent seeking reinstatement must pass the Multistate Professional Responsibility Examination.

5. Pursuant to Rule 25(c), RLDD, Ms. Lang shall serve a copy of the petition for reinstatement upon the OPC, and the OPC shall publish notice of the petition in the *Utah Bar Journal* pursuant to the requirements of Rule 25(d), RLDD. The OPC shall also notify the complainants pursuant to Rule 25(d), RLDD.

6. Pursuant to Rule 25(f), RLDD, after receiving Ms. Lang's petition for reinstatement, the OPC shall either advise Ms. Lang and the Court that it will stipulate to Ms. Lang's reinstatement or file a written objection to the petition.

7. Pursuant to Rule 25(g), RLDD, if the OPC objects to Ms. Lang's petition for reinstatement, the Court will conduct a hearing on Ms. Lang's petition. If the OPC files no objection, the Court will review the petition without a hearing and enter its findings and order.

Dated this 11th day of August, 2005.

BY THE COURT:

Honorable Robert K. Hilder
Third Judicial District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2005, I mailed via United States mail, first-class postage pre-paid, a true and correct copy of the foregoing ORDER STAYING THE RESPONDENT'S SUSPENSION AND CONCERNING THE RESPONDENT'S REINSTATEMENT TO THE PRACTICE OF LAW UPON TERMINATION OF THE PERIOD OF SUSPENSION to:

Andrew Berry
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600

_____

Summary Chart of
State Rules Governing Probation and Stayed Suspensions

Jurisdiction	Probation	Stayed Suspension
Alabama	Rule 8(h), Alabama Rules of Disciplinary Procedure, provides that probation is appropriate only in cases where there is little likelihood that the respondent will harm the public during the period of probation and where the conditions of probation can be adequately supervised.	Not identified in rules as a sanction but are ordered as "other requirements that the Disciplinary Board deems consistent with the purposes of lawyer discipline."
Alaska	Rule 16(a)(3), Alaska Rules of Disciplinary Enforcement, provides for probation as a sanction.	Not identified in rules as sanction
Arizona	Rule 60(a)(5)(B), Arizona Supreme Court Rules, provides that probation may be imposed when there is little likelihood that Respondent will harm the public during probation and conditions of probation can be adequately supervised	Not identified in rules as sanction
Arkansas	Section 17.E(7), Arkansas Supreme Court Procedures of Regulating Professional Conduct of Attorneys at Law, provides that prior to or subsequent to the filing of a formal complaint, a panel of the Committee may place the lawyer on probation for a period not exceeding two years. Probation shall be used only in cases where there is little likelihood the lawyer will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised.	Does not stay suspensions based on compliance with conditions

California	General Standard 1.5(e), California Standards for Attorney Sanctions for Professional Misconduct, addition of reasonable conditions, such as supervision by a probation monitor may be reasonable and appropriate in assessing compliance with any duties or conditions imposed	General Standard 1.4(c)(I), California Standards for Attorney Sanctions of Professional Misconduct, provides that an execution of a suspension may be stayed for a period of one to five years only if the stay and the performance of specified duties by the respondent are consistent with Standard 1.3, regarding protection of the public, courts, legal profession maintenance of high legal standards, etc.
Colorado	Rule 251.7, Colorado Rules of Civil Procedure, provides that an attorney may be placed on probation if they can demonstrate that they are unlikely to harm the public during the probationary period, can be adequately supervised, are able to practice law without causing the courts and the profession to fall into disrepute, and have not committed acts warranting disbarment.	Rule 251.7 allows probation to be imposed in conjunction with a suspension, which may be stayed in whole or in part (pursuant to Rule 251.6(b))
Connecticut	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public
Delaware	Rule 20, Delaware Lawyers' Rules of Disciplinary Procedure, provides for probation as a sanction.	Not identified in rules as sanction
District of Colombia	Rule XI, Section 3(a)(7), Rules Governing the District of Columbia Bar, may not be for more than three years. Imposed in lieu of or in addition to other sanctions.	Not identified in rules as sanction
Florida	Rule 3-5.1(c), Rules Regulating the Florida Bar, Respondent may be placed on probation for a period not less than 6 months nor more than three years or for an indefinite period determined by conditions stated in the order. Conditions may include but are not limited to: completion of a practice and professionalism enhancement program, supervision by a member of the Florida Bar, etc.	Not identified in rules as sanction
Georgia	Not identified in rules as sanction	Not identified in rules as sanction

Hawaii	Not identified in rules as sanction	Not identified in rules as sanction
Idaho	Rule 506(c)), Idaho Bar Commission Rules, only imposed in cases where there is little likelihood that the defendant will harm the public during the probation and the probation can be adequately supervised.	Rule 507(a)(1), Idaho Bar Commission Rules, provides that suspensions may be withheld in whole or in part, contingent upon the defendant's observance of specified conditions
Illinois	Rule 772, Illinois Supreme Court Rule, imposed only in cases where the attorney has demonstrated that he is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised. Attorney cannot have committed acts which warrant disbarment	Not identified in rules as sanction
Indiana	Rule 23 Section 3(c), Indiana Rules for Admission to the Bar and the Discipline of Attorneys, in cases of misconduct or disability, the Court may, in lieu of disbarment or suspension place an attorney on probation and permit the attorney to continue practicing law if in its opinion such action is appropriate and desirable. The attorney will be subject to the conditions and limitations as the Court sees fit to impose and upon violation of such conditions the attorney may be suspended or disbarred.	No identified in rules as sanction but it appears that Rule 23 Section 3(c) allows the Court to "stay" a suspension and place the attorney on probation. If the attorney violates the conditions of probation they may be suspended.
Iowa	Rule 34.13, Rules of Procedure of the Iowa Supreme Court Attorney Disciplinary Board, provides for a deferral of "further proceedings pending the attorney's compliance with conditions imposed by the board for supervision of the attorney for a specified period of time not to exceed one year unless extended by the board . . .."	Not identified in rules as sanction
Kansas	Not identified in the rules as a sanction; however, Rule 203, Kansas Supreme Court Rules, Subsection (a)(5) provides for any form of discipline or conditions separate from or connected to any other discipline that the Supreme Court deems appropriate	Not identified in the rules as a sanction; however, Rule 203, Kansas Supreme Court Rules, Subsection (a)(5) provides for any form of discipline or conditions separate from or connected to any other discipline that the Supreme Court deems appropriate

Kentucky	Rule 3.380, Rules of the Supreme Court of Kentucky, does not specifically provide for probations but rather public reprimands and/or suspensions with conditions. The "with conditions" clause has been used to probate sanctions.	Not identified in rules as sanction
Louisiana	Rule XIX, Section 10(A)(3), Rules for Lawyer Disciplinary Enforcement, probation should be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised	Not identified in rules as a sanction, they have developed jurisprudentially
Maine	Not identified in rules as sanction	Not identified in rules as sanction
Maryland	Not identified in rules as sanction	Not identified in rules as sanction
Massachusetts	Not identified in rules as sanction	Not identified in rules as sanction
Michigan	Rule 9.121(C), Michigan Court Rules, provides for probation when during the subject period the attorney was under the influence of drugs or alcohol and the impairment caused or substantially contributed to the conduct. Probation must not be contrary to the public interest and cannot exceed two years.	Rule 9.106 Michigan Court Rules allows reprimands or suspensions with conditions as the hearing panel, the board, or the Supreme Court may impose. In practice panels are more likely to issue a reprimand with conditions than probation.
Minnesota	Rule 15(a)(4), Minnesota Rules on Lawyers Professional Responsibility, upon conclusion of the proceedings the Court may place the lawyer on probationary status for a stated period or until further order of the Court, with such conditions as the Court may specify and to be supervised by the Director.	Not identified in the rules as a sanction but the Court routinely imposes stayed suspensions, and even imposed one stayed disbarment.
Mississippi	Rule 8(b)(iii), Rules of Discipline for the Mississippi State Bar, provides for suspensions with or without probation for a fixed period of time	Not identified in rules as sanction
Missouri	Rule 5.225(a), Missouri Rules Governing the Missouri Bar and the Judiciary, lawyer is eligible for probation if he or she is unlikely to harm the public during the period of probation and can be adequately supervised; lawyer must be able to practice law w/o causing courts or profession to fall into disrepute; and cannot have committed an act warranting disbarment. Must be imposed for a specified period of time and in conjunction with a suspension	Rule 5.225(a), Missouri Rules Governing the Missouri Bar and the Judiciary, Probation provides that probations must be imposed in conjunction with suspension that may be stayed in whole or in part

Montana	Rule 9(C), Montana Rules of Lawyer Disciplinary Enforcement, allows lawyer to be placed on probation for such time and conditions as are determined to be appropriate.	Not identified in rules as sanction
Nebraska	Rule 4(A)(3), Nebraska Disciplinary Rules, provides for probation in lieu of or subsequent to a suspension.	Not identified in rules as sanction
Nevada	Not identified in the rules as a sanction but are routinely imposed by agreement and/or contested hearing and are upheld by the Supreme Court	Not identified in the rules as a sanction but are routinely imposed by agreement and/or contested hearing and are upheld by the Supreme Court
New Hampshire	Not identified in rules as sanction	Not identified in rules as sanction
New Jersey	Not identified in rules as sanction	Not identified in rules as sanction
New Mexico	Rule 17-206(B), New Mexico Rules Governing Discipline, if the record discloses that the respondent can still perform legal services with proper supervision the Supreme Court may impose probation or other conditions as a type of discipline by itself or may defer the effect of the sanctions specified in subparagraphs 1, 2, 3, or 4 (regarding disbarment, suspension, indefinite suspension, or public censure).	Rule 17-206(B), New Mexico Rules Governing Discipline, provides that the Supreme Court may defer the effect of sanctions, including suspensions.
New York	Not identified in rules as sanction	Not identified in rules as sanction
North Carolina	Not identified in rules as sanction	General Statutes of North Carolina section 84-28(c)(2) allows for suspension for a period of up to five years, any portion of which may be stayed.
North Dakota	Rule 4.3(a), North Dakota Rules for Lawyer Discipline, provides for probation in cases where there is little likelihood that the attorney will harm the public during the supervised period and the conditions of the probation can be adequately supervised.	Not identified in rules as sanction
Ohio	Rule V, Section 6.(B)(4), Rules for the Government of the Bar of Ohio, probation for a period of time upon conditions as the Supreme Court determines, but only in conjunction with a suspension pursuant to division (B)(3) of this section.	Rule V. Section 6. (B)(3) Suspension from the practice of law for a period of six months to two years subject to a stay in whole or in part

Oklahoma	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public
Oregon	Rule 6.2(a), Oregon State Bar Rules of Procedure, upon determination that an attorney should be suspended the trial panel may stay the suspension in whole or in part and place the attorney on probation for a period no longer than three years.	Rule 6.1(a)(v), Oregon State Bar Rules of Procedure, a suspension for any period in BR 6.1(a)(iii) or 6.1(a)(iv) which may be stayed in whole or in part on the condition that designated probationary terms are met
Pennsylvania	Pennsylvania Rules of Disciplinary Enforcement, Subchapter G section 89.291repsondent attorney may be placed on probation if they have demonstrated that they can perform legal services and will not cause the legal profession to fall into disrepute; are unlikely to cause harm to the public during the period of probation; the necessary conditions of probation can be adequately supervised; and are not guilty of acts warranting disbarment.	Not identified in rules as sanction
Rhode Island	Not identified in the rules as a sanction but the Court can and does enter disciplinary orders imposing conditions that are tantamount to probation	Not identified in the rules as a sanction but the Court can and does enter disciplinary orders imposing conditions that are tantamount to stayed suspensions
South Carolina	Not identified in rules as sanction	Not identified in rules as sanction
South Dakota	Not identified in rules as sanction	Not identified in rules as sanction
Tennessee	Rule 9 Section 8.5, Tennessee Rules of Disciplinary Enforcement, the imposition of a suspension may be suspended in conjunction with a fixed period of probation. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the probationary period and where the conditions of probation can be adequately supervised.	Rule 9 Section 8.5, Tennessee Rules of Disciplinary Enforcement, indicates that a suspension may be stayed in conjunction with fixed period of probation.

Texas	Rule 15.11, Texas Rules of Disciplinary Procedure, provides that fully probated suspensions shall not be used in cases where the respondent received a public reprimand or a fully probated suspension within the last five years for violation of the same rule/rules; the respondent received two or more fully probated suspensions within the last five years; or the respondent received two or more public reprimands or greater within the last five years for conflict of interest, theft, misapplication of fiduciary property, or the failure to return a clearly unearned fee.	2.25 and 3.14, Texas Rules of Disciplinary Procedure, allow for stayed suspensions. Disbarments may not be stayed.
Vermont	Administrative Order 9, Rule 8(A)(6), Vermont Supreme Court Administrative Orders and Rules, Probation may be imposed only in conjunction with another sanction, reinstatement from disability, reinstatement from disbarment, or suspension. Shall be used only in cases where there is little likelihood that the respondent will harm the public during the probation and the conditions of probation can be adequately supervised.	Not identified in rules as sanction
Virginia	Not identified in rules as sanction	Not identified in rules as sanction
Washington	ELC 13.8, Washington Rules for Enforcement of Lawyer Discipline, a respondent who has been sanctioned under 13.1 (disbarred, suspended, or reprimanded) or admonished under 13.5(b) may be placed on probation for a fixed period of two years or less.	Not identified in rules as sanction
West Virginia	Rule 3.15(1), West Virginia Rules of Disciplinary Procedure, provides for probation.	Not identified in rules as sanction
Wisconsin	Not identified in the rules as a sanction, although the Court occasionally imposes "conditions on continued practice."	Not identified in rules as sanction
Wyoming	Not identified in rules as sanction except as may be appropriate under the terms of a diversion contract pursuant to Section 14, Wyoming Disciplinary Code	Stayed suspension cannot be longer than five years pursuant to Section 4(a)(ii), Wyoming Disciplinary Code

*This chart was prepared in August 2006 based upon information provided to the OPC by its counterparts in other states.